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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1931.

NO. 84

W. L. MATTHEWS, et al, Appellants,
Vs.
J. F. RODGERS, et al, Appellees.

REPLY BRIEF FOR APPELLANTS.

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Counsel for appellants desire to file a reply to that part of appellees' brief under the heading of "The Merits." Counsel for appellees cite, quote from and strongly rely upon the following two cases:

William Lemke vs. Farmers' Grain Co., 258 U. S. 50;
Shafer vs. Farmers' Grain Company, 268 U. S. 189.

The facts in said cases were practically the same and are practically the same as the facts in the case at bar. However, I will undertake to distinguish between the statutes construed in those cases and the statutes construed in the case at bar. Briefly stated, the facts were in said cases that certain persons were engaged in buying and shipping grain; that 90 percent or more of said grain was sold in interstate commerce, and 10 percent or less was sold in intra-

state commerce. In the case at bar appellees were engaged in the business of buying and selling cotton. 90 percent or more was sold in interstate commerce; 10 percent or less was sold in intrastate commerce.

In the two cases cited the Supreme Court was construing a statute of North Dakota. This statute attempted to fix the selling price or the margin of profit between the purchase and sales price of grain bought in North Dakota and sold. This statute applied and regulated the sales price of every bushel of grain bought in said state whether sold in interstate or intrastate commerce. There could be no interstate sale to which said statute would not apply. In the case at bar appellees were selling cotton both in interstate and intrastate commerce. Under the facts as shown in said record the appellees would have been liable for the privilege tax, even though they had not sold any cotton in interstate commerce. If they had not sold any cotton in intrastate commerce, there would have been no liability for the tax. It is shown by the pleading and by the agreed statement of fact that the law would not apply to persons engaged solely and exclusively in interstate commerce. At page 25 of the record in defendants' answer is the following statement:

> "Defendants admit the allegations in paragraph 1 of Section V but say that said section has no application to any person, firm, or corporation engaged solely and alone in interstate commerce, and that no officer of the State of Mississippi and none of the defendants named in said bill undertake, attempt, or threaten to enforce the provisions of said act when a person is engaged in interstate commerce alone. Defendants

admit, however, that when a person is engaged in both interstate and intrastate business that said defendants do attempt to enforce the provisions of said act."

At page 32 of the record it is shown that during one year the total business of appellee H. J. Murff and Company was $1,874,004.85; that $1,839,669.35 was interstate commerce and $34,335.50 was intrastate commerce. At page 36 of the record it is shown that the business of appellee B. F. Oliver and Company for three and one-half months was $114,626.49; that $102,952.87 was interstate commerce and $11,673.62 was intrastate commerce. This statement covers a period of only three and one-half months. These two businesses were taken as representative of the others, Murff and Company being one of the largest cotton buyers and Oliver and Company one of the smallest.

At page 9 of the record in the original bill of complaint it is alleged as follows:

> "The business of each individual plaintiff herein necessarily varies, but plaintiffs allege that the annual business of the plaintiffs herein range from 5,000 bales to 25,000 bales each, a reasonable profit for a cotton buyer in buying and reselling a bale of cotton upon said market in the manner aforesaid is not less than two and 50/100 dollars ($2.50) per bale."

In other words, the gross profit from said business ranges from $12,500.00 to $62,500.00 per annum.

The tax imposed on said cotton buyers as alleged in

said bill is $100.00 per year. This tax applies to all persons engaged exclusively in intrastate business and those who are engaged both in intrastate and interstate commerce because of the intrastate. It cannot be successfully contended that a person who is engaged alone or exclusively in intrastate commerce and who does a business of $34,000 upwards a year, or who does a business of $11,000 and upwards in three and one-half months would not be liable for this tax. In fixing the amount of this tax the legislature evidently had in mind that a large part of the cotton business in Mississippi was interstate, and, for this reason, fixed the tax at a very small amount. It is shown that the business of Murff and Company for one year was almost $2,000,000.00. The legislature certainly did not intend to tax all of this business when it fixed the tax at $100.00. Under the provisions of Section 189 of Chapter 88, Laws of 1930, a person engaged in buying and selling merchandise, or operating a store with a capital stock of more than $15,000.00 is required to pay a privilege tax of $100.00. In order for such person to do a volume as done by Murff and Company he would have to turn his entire stock 120 times each year.

Appellant cites and quotes at length from *Bowman vs. Continental Oil Company*, 256 U. S. 642. The facts in the Bowman case are analogous to the facts in this case. However, in said opinion the court holds as follows:

> "Upon the question of severability we are constrained to concur in the view adopted by the district court and this notwithstanding our hesitation in advance of a declaration of the court of last resort of the state to adopt a construction

bringing the law in conflict with the Federal Constitution."

This court has repeatedly held that the interpretation of a state statute in reference to its constitutionality by a state court of last resort is binding on this court.

It is true that the Supreme Court of Mississippi has never construed the statute imposing a privilege tax on cotton buyers. However, it will be noted with interest that Section 3339, Code of 1892 levies a privilege tax:

> "On each person engaged in buying or selling cotton for himself, or his agent, or employee of another and not a licensed merchant ..... $20.00."

That Section 3797, Code of 1906 levied a privilege tax:

> "On each person engaged in buying or selling cotton for himself, or his agent, or employee of another and not licensed as a merchant ..... $25.00."

That Section 67, Chapter 118, Laws of 1926, levied a privilege tax upon:

> "Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of ..... $100.00"

This section contains also practically the same provision as Section 56, Chapter 88, Laws of 1930, the statute now in controversy.

I also call the court's attention to the fact that Section 3108, Code of 1930 provides as follows:

> "The following shall be exempt from taxa-

> tion * * * * * * (i) All farm products grown in this state for a period of two years after they are harvested when in the possession of or the title to is in the producer, except a tax of one-fifth of 1 percent per pound on lint cotton now levied by the board of commissioners of the Mississippi Levee District, and lint cotton for five years, regardless of ownership."

Section 3401, Code of 1892, Section 3894, Code of 1906, Section 221, Chapter 118, Laws of 1926 each provides that the privilege tax required by law in this state shall be paid and license obtained prior to the time the business is engaged in. In other words, the procurement of a license must be had before business is commenced, or the person engaging in such business will be subject to prosecution. In other words, the provisions of these sections are practically the same as Section 220, Chapter 88, Laws of 1930, except the person applying for license would not have to make written application therefor.

Chapter 90, Laws of 1930 levies a gross sales tax on certain businesses therein mentioned. Section 2 (c) of said chapter provides as follows:

> "Upon each person engaging or continuing within this state in the business of selling any tangible property whatsoever, real or personal, (not including, however, bonds or other evidences of indebtedness or stocks) there is hereby levied and shall be collected a tax equivalent to one-fourth of one per cent of the gross income of the business."

Section 4 of said chapter provides in part as follows:

"There are, however, exempted from the provisions of this article: * * * * * * * (c) Labor, agricultural and horticultural societies and organizations not operated for profit; and products of the farm including live stock, poultry, grove or garden when sold directly by the producer, or his authorized agent, and so long as said farm products are handled and/or sold by any one in their package and/or in the original state or condition of preparation of sale."

These statutes exempt the cotton buyer from the gross sales tax levied by said chapter.

I find, however, that our Supreme Court has construed statutes analogous to the one under consideration. In the case of *New Orleans M. & C. Railroad Company vs. State*, 110 Miss., 290, the court holds as follows:

"The state, through Ross A. Collins, Attorney General, and D. L. Thompson, Auditor of Public Accounts, brought this action of debt against appellant, a railroad company incorporated under the laws of Mississippi and operating a line of railroad from Mobile in the state of Alabama, through Mississippi, and to Middleton, Tennessee, to recover the privilege taxes for the year 1914, imposed by chapter 102, Laws of 1912, amending section 3856, ch. 114, of the Code of 1906. Chapter 102 of the Laws of 1912 is as follows:

'An act to increase the privilege taxes on railroads by amending section 3856 of chapter 114, of the Code of 1906. 'Amending Code as to Privilege Tax on Railroads.

'Section 1. Be it enacted by the legislature of

the state of Mississippi, that section 3856 of chapter 114, of the Code of 1906, levying privilege taxes on railroads be, and the same is hereby amended so that for the purpose of levying a privilege tax on railroads such railroads are divided into five classes, first, second, third, narrow gauge and levee district, and privilege taxes are levied on them as follows:

'On each railroad of the first class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), forty-five dollars.

'On each railroad of the second class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), Twenty-five dollars.

'On each railroad of the third class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), ten dollars.

'On each narrow gauge railroad, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), two dollars and fifty cents.

'On that part of each levee district railroad of the first class, within the levee district or districts, on which levee taxes are paid, per mile, twenty dollars.

'On that part of each railroad of the second class, within the levee district or districts, on which levee taxes are paid, per mile, fifteen dollars.

'On that part of each railroad of the third class within the levee district or districts, on

which levee taxes are paid, per mile, seven dollars and fifty cents.

'On that part of each narrow gauge railroad within the levee district or districts, on which levee taxes are paid, per mile, two dollars and fifty cents.

'Sec. 2. The Railroad Commission shall, annually, on or before the first Monday in August, classify the several railroads according to their charter, and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the said Railroad Commission shall be certified to the auditor of public accounts and the chancery clerk of the county through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subjected to the pains and penalties imposed by section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law.

'Sec. 3. That this act take effect and be in force from and after its passage.

'Approved March 16, 1912.'

"Appellant was classified by the Railroad Commission as being in the third class and liable for the privilege tax of ten dollars per mile, and, declining to pay this tax, this suit was instituted in the circuit court of Forrest County for the recovery thereof. The declaration charges that appellant does a general intrastate business in the state of Mississippi, and operates a railroad in and through the counties of Green, Jasper, Jones,

Forrest, Perry, Newton, Neshoba, Winston, Choctaw, Webster, Chickasaw, Pontotoc, Union, and Tippah, and through various municipalities, which are detailed; that the Mississippi Railroad Commission had classified the railroads in the state in accordance with their charters and the gross earnings on intrastate business in the state, and that appellant had been classified as being a third class railroad within the meaning of said statute, and, by virtue of the act in question, was due to the state of Mississippi the sum of ten dollars per mile, or an aggregate sum of three thousand, five hundred and eighty-five dollars and fifty cents; that in addition, each of the municipalities mentioned in the declaration has a right under the laws of the state to levy a privilege tax not to exceed fifty per cent of the state tax, or five dollars per mile for the mileage within its corporate limits; that a statement of the municipalities and the amounts and their rates on the number of miles within the boundaries of each is attached to the declaration as Exhibit A, and made a part thereof, and that the defendant was due the several municipalities the amount shown in the exhibit; that the privilege tax in question is required to be paid to the auditor of public accounts on or before the first day in December of each year; that the tax is due and unpaid; that demand had been made, and the defendant refused to pay. Exhibit A tabulates the counties, and gives the mileage and total tax due on mileage in each county, and likewise shows a total amount claimed by municipalities of three hundred and one dollars and fifty cents, making a grand total of three thousand, nine hundred and eighty-nine dollars.

"A demurrer was interposed to the declara-

tion, attacking the constitutionality of the statute imposing this tax and submitting: First, that the act in question is void because in contravention of article 1, section 8, of the federal Constitution, in that it attempts to interpose a tax upon interstate commerce, and is an attempt to regulate the interstate commerce carried on by the defendant; second, that the act requires the Railroad Commission to classify railroads according to their gross earnings, and imposes a larger or smaller tax according to the amount of gross earnings as compared with the gross earnings of other carriers, and hence imposes a burden upon the interstate commerce of the defendant; third, that the statute contravenes the Fourteenth Amendment to the federal Constitution, in that it deprives the defendant of its property without due process of law and denies to it the equal protection of the law; and, fourth, that the act contravenes section 112 of the Constitution of the state of Mississippi, providing that taxation shall be uniform and equal throughout the state. The demurrer was overruled. The defendant declined to plead further, and judgment final was entered for the full demand sued for. From this judgment, appellant prosecutes an appeal, assigning as error the refusal of the court to sustain the demurrer and to hold the statute void and unconstitutional for the reasons submitted by the several grounds of the demurrer."

* * * * * * * * * *

"It is contended by appellant that the statute is obnoxious and contravenes the federal Constitution, in that it imposed a burden on the interstate commerce carried on by appellant as an interstate railroad; that the statute embraces all

railroads in Mississippi, both interstate and intrastate, without excepting from its operation the interstate business carried on by interstate railroads. It is further contended that the act imposes a burden on interstate commerce because of the provision directing the Railroad Commission to classify the several railroads according to the "gross earnings of each," without exempting or excepting the earnings derived from interstate commerce and business done for the United States government. It was the purpose of the statute in question to impose on railorads a privilege tax for doing business within the confines of our state —for doing a purely intrastate business. The whole act and the chapter in which it appears in our Code show a general scheme for imposing an excise or privilege tax on various occupations, businesses, and professions within the confines of our state, to raise revenues in support of our state government, and the act assumes, of course, that the occupation or business taxed is one to be done or carried on within the state. The right of the state to impose a privilege tax on railroads for doing a purely intrastate business is not controverted. Railroad companies by right of eminent domain appropriate and occupy hallowed and valuable territory, and otherwise enjoy special privileges and franchises. Individuals and corporations other than railroads are subjected to similar taxation. For the doing of an intrastate business, therefore, there can be and is no complaint by appellant. It is chartered under the laws of our state, and admittedly is doing both an intrastate and an interstate business. This statute, which has been on our books since 1892, in the first place levies a tax upon the privilege of doing a railroad business in Mississippi, and then for

the purpose of measuring that tax it prescribes and fixes a maximum and a minimum tax per mile on a standard gauge railroad, and, as a further means of distributing the burden in an equitable manner, empowers and directs the State Railroad Commission to classify standard gauge railroads into first, second, and third classes 'according to their charter and the gross earnings of each'."

* * * * * * * * * * *

"In attempting to square the act in question with the Constitution of the United States we must of course look to the act itself, the context or subject-matter dealt with, and the general purpose attempted to be accomplished. Taking the act by the four corners and keeping in view the object to be attained, we find this statute a part of the general scheme for levying privilege taxes on the several and various kinds of businesses, trades, and professions done, practiced and carried on in Mississippi. The state in its sovereign capacity is exacting from those who do business and practice and enjoy their several trades and professions a tax as a condition precedent to the right of exercising the privileges. The subject of the tax in each case is the party or corporation doing business, plying his trade, or practicing his profession in Mississippi, and not, of course, in a foreign state or country. The business sought to be taxed is, in each instance, the business done within the confines of our own state. In the case of appellant the tax sought to be imposed was certainly intended to be upon the business enjoyed by it in Mississippi and as a domestic corporation. Every intelligent man knows, and the legislature in enacting this law well knew, that a tax could not be imposed by our legislative de-

> partment on interstate commerce, and that no law could be passed burdening interstate commerce or seriously embarrassing railroads in doing such business, or in doing business for the United States government. It is therefore unreasonable to assume that the legislature had any intention of burdening or embarrassing interstate commerce."

It will be noted by the court that the language of the statute construed in said case is practically the same as the language of the statute in controversy in this case, that is, there is nothing in the language of either statute that would specifically limit its operations to intrastate commerce. It will be further noted that the court held that the railroad could not complain because it was taxed at the lowest rate. Appellees in the case at bar pay the same tax as the smallest cotton buyer engaged exclusively in intrastate commerce.

In the case of *J. E. Raley Brothers, et al vs. W. S. Richardson, et al*, 264 U. S. 157, this court held as follows:

> "Mr. Justice Sutherland delivered the opinion of the court:
>
> "A statute of Georgia (Acts 1921, p. 46, Par. 30) imposes a flat tax of $100.00 upon any broker or commission merchant buying or selling merchandise on commission for another, or engaged in the business of receiving or distributing articles of merchandise shipped to such broker or merchant for distribution on account of the shipper. The bill filed below sought to enjoin the collection of the tax on the ground that the statute violates the commerce clause of the Federal Con-

stitution, and also, contingently, upon the further ground that the statute is void under the equal protection clause of the 14th Amendment.

"The complainants were divided into two classes, A and B. The business of those in Class B was to solicit orders for goods from dealers in Georgia, which orders were sent to be filled, sometimes to nonresidents and sometimes to resident principals, the greater part of the business being with nonresident principals. The business of those in Class A was wholly confined to representation of nonresident principals. Upon acceptance of an order the goods are shipped by the principal to the purchaser, but remain the property of the former until the time of sale.

"The trial court sustained the tax as to Class B, and enjoined its collection as to Class A, and its judgment was affirmed by the supreme court. 154 Ga., 140, 113 S. E. 531. We are concerned here with the judgment only in so far as it affects Class B.

"The contention is that the tax is laid expressly upon all brokers and commission merchants in the state, and upon the business done by them, whether interstate or intrastate, without separating one from the other. The state courts, by whose construction we are bound, held that the statute did not apply to interstate business; and we consider it as though it so provided in terms. It was held, however, that inasmuch as Class B complainants were engaged in intrastate business, they were subject to the tax, and none the less because they were also engaged in interstate business. With this conclusion we fully agree.

"The complainants were definitely engaged in the domestic business described in the statute, and were liable to the tax, irrespective of the extent of it, and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. *Kehrer vs. Stewart*, 197 U. S. 60, 69, 49 L. ed. 663, 668, 25 Sup. Ct. Rep. 403. Certainly, one cannot avoid a tax upon a taxable business by also engaging in a nontaxable business.

"There is nothing in the contention that, because, under the construction placed upon the statute by the state courts, the tax falls upon those engaged in domestic business, and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the 14th. Amendment to say that because a state is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the state observe the rule of equality among the persons subject to its taxing power.
Affirmed."

In the Bowman case, supra, this court states that it is deciding the question in advance of its determination by the Supreme Court of the State of New Mexico, while in the Raley case it followed a construction of the statute by the

Supreme Court of Georgia which is in direct conflict with the finding of the court in the Bowman case.

My contention is that the Supreme Court of this state has construed the state statute, and that this court is bound thereby. See also *Frank F. Kehrer vs. A. P. Stewart*, 197 U. S. 60, in which the court held as follows:

> "The only difficulty in this case arises from the fact that the tax is laid not in terms upon the domestic business, nor upon the gross receipts or profits which might be apportioned between interstate and domestic business, but is a gross sum imposed upon the managing agent of packing houses, regardless of the fact that the greater portion of the business may be interstate in its character. This contingency, however, is met by the case of *Osborne vs. Florida*, 164 U. S. 650, 41 L. Ed. 586, 7 Sup. Ct. Rep. 214, wherein a license tax imposed upon express companies doing business in Florida had been construed by the supreme court of that state as applying solely to business of the company done within the state, and not to its interstate business. Accepting this construction of the state statute as in reality part of the statute itself, we held that it did not in any way violate the Federal Constitution. The statute was sustained, notwithstanding the fact that 95 per cent of the business was interstate in its character, and only 5 per cent consisted of carrying goods and freight between points within the state of Florida."

Counsel also desires the following cases that should have been cited in the original brief:

Point I C—*Grambling v. Maxwell, Commissioner*, 52, Fed. 2nd. 256, Advance Sheets.

Point II A & B. *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 52 Fed. 2nd, 456, Advance Sheets.

I therefore, submit that inasmuch as appellees are engaged in intrastate business as well as in interstate business that the tax levied by said section 56, chapter 88, Laws of 1930 is not unconstitutional when assessed against plaintiff. I, therefore, most respectfully submit that the lower court erred in holding that section 56, chapter 88, Laws of 1930, was unconstitutional; that it erred in granting a perpetual injunction, and that its decree should be reversed by this court.

Respectfully submitted,

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